STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE DISPATCHERS GUILD, Complainant,	)	CASE 20542-U-06-5231
vs.	)	DECISION 9956 - PECB
CITY OF SEATTLE, Respondent.	)	ORDER OF DISMISSAL

Cline & Associates, by *Aaron D. Jeide*, Attorney at Law, for the union.

City Attorney Thomas A. Carr, by *Kathleen O'Hanlon*, Assistant City Attorney, for the employer.

On July 26, 2006, the Seattle Police Dispatchers Guild (union) filed an unfair labor practice complaint with the Public Employment Relations Commission (Commission) against the City of Seattle (employer). On October 9, 2006, the Commission issued a preliminary ruling finding a cause of action to exist for employer interference with employee rights and refusal to bargain, by the employer's unilateral change in layout and configuration of work stations within the communications center without providing an opportunity for bargaining. Examiner Paul T. Schwendiman conducted a hearing on April 3 and 4, 2007. The parties filed post-hearing briefs to complete the record.

ISSUES PRESENTED

1. Was the employer's decision to change the layout and configuration of the employee work stations a mandatory subject of bargaining?

2. Did the employer provide notice to the union of the employer's reconfiguration decision?

3. Did the union waive, through inaction, its right to bargain any effects of the reconfiguration decision?

Under the Commission's balancing test, the employer's reconfiguration decision was a permissive subject of bargaining. The employer provided notice to the union of the employer's decision. Through inaction, the union waived its right to bargain any effects of the decision. The Examiner dismisses the complaint.

Issue 1

Was the employer's decision to change the layout and configuration of the employee work stations a mandatory subject of bargaining?

Applicable Legal Standard

Parties to a collective bargaining relationship under Chapter 41.56 RCW have a duty to bargain over wages, hours, and working conditions of bargaining unit employees. RCW 41.56.030(4). The potential subjects for bargaining between employers and unions are commonly divided into "mandatory," "permissive," and "illegal" categories. Matters affecting wages, hours, and working conditions are mandatory subjects of bargaining, while matters considered remote from "terms and conditions of employment" or that are regarded as prerogatives of employers or of unions, are permissive subjects. Illegal subjects of bargaining are matters which neither the employer nor the union have the authority to negotiate, because their implementation of an agreement on the subject matter would contravene applicable statutes or court decisions.

Whether a particular subject is a mandatory subject of bargaining is a question of law and fact for the Commission to decide. WAC

391-45-550. In determining whether a subject is a mandatory subject of bargaining, the Commission balances (1) the relationship of the subject to wages, hours, and working conditions, and (2) the extent to which the subject lies "'at the core of entrepreneurial control'" or is a management prerogative. *City of Richland*, 113 Wn.2d 197 (1989). For a permissive subject of bargaining, an employer still has a duty to bargain effects of the its permissive decision on mandatory subjects. *City of Richland*, Decision 2448-B (PECB, 1987), *remanded*, 113 Wn.2d 197 (1989). The critical consideration in determining whether an employer has a duty to bargain concerning the effects of a permissive decision, is the nature of the impact on the bargaining unit. *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991).

Analysis

In applying the balancing test, the Examiner considered several factors. First, whether the floor plan reconfiguration is a management prerogative. Second, how the reconfiguration relates to employee working conditions, including health and safety, interpersonal relationships, and risk of discipline.

a. Management Prerogative

When the employer changed the layout and configuration of the employee work stations in the communications center, work stations were moved closer together to accommodate the addition of four work stations. Under the new arrangement, most employees are now seated back-to-back in pods of two, as opposed to having aisle space between the back of work stations. While the reconfiguration affected working conditions, it provided the employer with benefits.

The employer advanced the following reasons for adding the work stations: establishing increased accountability and accessability of the telephone reporting unit officers and their supervisors by

placing them in the same room; freeing up the officers' work space to be used as a training area or conference room; equipping the new work stations with Positron capability allowing for increased staffing of dispatchers at peak times; and demonstrating employee equality. The ability of the employer to supervise its employees could have a direct impact on the employer's goals of maximizing productivity and increasing efficiency.

The new configuration allowed the employer to increase the number of work stations on the floor for use in emergency response during peak call times. The telephone reporting unit officers and the dispatchers are supervised by the same sergeant. The employer moved four telephone reporting unit officers, who were previously in a separate room from their supervisor, into the same room with the dispatchers. The reconfiguration is a management prerogative because the employer has the right to decide how rooms are arranged, the amount of equipment in the room, and how to manage or supervise employees.

b. Health and Safety

The union argues the reconfiguration is a mandatory subject of bargaining because the reconfiguration affects employee health and safety; specifically, the ambient noise level is a health and safety concern. The union cites *Armour Oil Co.*, 253 NLRB 1104 (1981), in which the National Labor Relations Board (NLRB) found the replacement of trucks impacted working conditions because the replacement trucks were rougher to drive, more difficult to handle, lacked newer safety equipment, and were noisier. The decision was not based solely on the noise level of the replacement trucks; rather, the replacement trucks were an unsafe working condition.

In this case, the evidence does not show that the noise level after the reconfiguration causes an increased risk to the employees' health and safety. The union presented no evidence that the communications center was noisier after the four work stations were

added. Nor did the union introduce evidence showing that the noise level adversely affected employee health, by say, causing increased hearing loss. The union argued that there was increased germ transfer due to the closer proximity of the dispatchers. Fred Treadwell, director of human resources for the police department, testified that a comparison of sick leave used during 2005-2006 and 2006-2007 showed individual sick leave usage declined. The number of sick days used by the employees is not conclusive as to whether or not germs were being transferred more readily because of the closer proximity between the workers.

Brian Osterreicher, a chief dispatcher, testified that there were only two doors of entry into the communications center, but the windows could be used as another means of escape. Lieutenant Mark Kuehn testified that an anonymous tip was placed to the Washington State Department of Labor and Industries, which conducted a surprise inspection. The inspection yielded no violations of Labor and Industry standards. If Labor and Industries had found that the work area was unsafe due to a lack of evacuation and access points, the union's argument that the reconfiguration jeopardizes the safety of the employees would have been more persuasive. However, from the testimony presented, the floor configuration does not pose a safety risk.

In addition to arguing that the reconfiguration affected employee health and safety, the union argues that the reconfiguration impacted the health and safety of the public. Union president Scott Best testified that the proximity of the dispatchers to each other makes it more difficult to hear the caller. The union cites the increased risk of error and inability to hear callers resulting from background noise as a safety risk to the public. It is squarely within the employer's entrepreneurial control to determine how it conducts business and provides service to the public. If the employer decides the potential risk of error or the risk of a

caller overhearing another call is an acceptable risk, then the employer has the prerogative to conduct business in such a manner.

Matters affecting employee health and safety may be a mandatory subject of bargaining. Simply stating that the reconfiguration impacts employee safety does not mean employee safety is impacted. In order to rise to the level of a mandatory subject, the effect on health and safety must impact employees directly. The union did not show that the reconfiguration impacted employee health and safety.

c. Employee Relations

As a result of the reconfiguration, the interpersonal relationships of the dispatchers has changed. Particularly, employees can now more acutely smell their co-workers, who smoke or have body odor, because they are now seated closer together. The interpersonal relationships of the dispatchers are issues that need to be resolved among the employees. The reconfiguration is not the main reason employees can smell each other. Rather, the fact that one employee can smell another employee is a direct result of personal behavior or ability to smell.

d. Increased risk of discipline

There is the potential for an employee to be disciplined if the employee does not hear what the caller says. The calls are taped, which is how the employer could prove an employee did not hear what a caller said. Union president Best could only give his opinion as to what the potential effect of discipline could be as a result of the closer proximity of dispatchers.

Osterreicher testified that performance evaluations include such areas as the amount of time spent on a call and the accuracy of the dispatcher. A poor performance evaluation results in an employee signing a document stating that the employee received the poor performance evaluation. An employee could be given remedial

training. If poor performance continued, the employee could be disciplined, demoted, or have duties reduced.

The union has not shown that the potential for discipline increased. Numerous things prevent dispatchers from hearing what the caller says, including events out of the control of the employer or the dispatcher. Any negative impact of the reconfiguration on discipline has not been proven.

e. Conclusion

Weighing the management prerogative to reconfigure the floor plan in order to better supervise employees and maximize productivity and efficiency, against the impacts of the reconfiguration on the employees' working conditions, the interests of management out weigh the interests of the employees. The employer's reconfiguration is a permissive subject of bargaining.

Issue 2

Did the employer provide notice to the union of the employer's reconfiguration decision?

Applicable Law

An employer's duty to bargain includes a duty to give notice and provide opportunity for bargaining prior to changing employee wages, hours, or working conditions. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). A party to a bargaining relationship commits an unfair labor practice if it fails to give notice of a change affecting a mandatory subject of bargaining, or fails to bargain in good faith upon request. *Federal Way School District*, Decision 232-A (EDUC, 1977).

The decision by the employer to change the reconfiguration of employee work stations is a permissive subject of bargaining. An

employer has no duty to bargain its decision to change a permissive subject. However, an employer is required to bargain the effects of a permissive decision on employee wages, hours, or working conditions. *Seattle School District*, Decision 5755-A (PECB, 1998). Notice by an employer of a permissive decision provides a union with an opportunity to request bargaining on the effects of the decision. If the effects of a permissive decision are sufficiently foreseeable, the bargaining obligation attaches before the decision is implemented. *Spokane County Fire District 9*, Decision 3661-A.

Analysis

On July 13, 2005, the employer sent union president Best a letter informing the union of the employer's decison to move the four telephone reporting unit officers, who were previously in a separate room, onto the communications center floor with the dispatchers in the fourth quarter of 2005. Following this letter, the union did not request to bargain the effects of the reconfiguration. In response to the letter the union raised one question: what would happen to the round reference table in the middle of the communications center. The union had the opportunity to inquire about how the reconfiguration would look, but failed to do so.

An employer does not have a duty to notify a union what the impacts of a permissive decision will be on bargaining unit employees. The union is in the best position to know what the impacts of a change will be on employee wages, hours, or working conditions. The union would have the Examiner believe that the union could not fathom the desks being moved closer together to accommodate the addition of four employees to the communications center floor. Such consequences should have been obvious to the union.

Issue 3

Did the union waive, through inaction, its right to bargain any effects of the reconfiguration decision?

Applicable Law

After receiving notice of a change in a permissive subject of bargaining, a union must make a timely request to bargain the impacts of the change on wages, hours, or working conditions of employees. If the union fails to request bargaining, a waiver by inaction defense asserted by an employer may be sustained. *Lake Washington Technical College*, Decision 4721-A (PECB, 1995). Silence will support a finding of waiver by inaction. *City of Burlington*, Decision 5841-A (PECB, 1997). A specific and timely request that the employer bargain a matter will, generally, support a finding that the union has not waived bargaining by inaction. *Seattle School District*, Decision 5755-A. The party claiming waiver has the burden of proof.

Analysis

The employer first informed the union of its reconfiguration decision on July 13, 2005. At that time, the union did not request to bargain the floor reconfiguration. The reconfiguration did not proceed as scheduled. On April 3, 2006, the employer informed employees by a memo that the move would begin on April 10, 2006. A copy of this memo was not sent to the union. By a May 1, 2006 letter, the union requested to bargain both the reconfiguration decision and the effects of the decision.

In July 2005, the union had notice that the employer planned to relocate four telephone reporting unit officers from their work area to the communications center floor in the fourth quarter of 2005. At that time, the union did not request to bargain the reconfiguration. By failing to request bargaining at the time the employer notified the union of its reconfiguration decision, the union waived its right to bargain any effects of the decision on employees.

FINDINGS OF FACT

1. The City of Seattle is a public employer within the meaning of RCW 41.56.030(1).

2. The Seattle Police Dispatchers Guild (union) is a bargaining representative within the meaning of RCW 41.56.030(3).

3. Scott Best is the president of the union.

4. On July 13, 2005, the employer sent a letter to union president Best, informing the union of the employer's decision to move four telephone reporting unit officers onto the communications center floor in the fourth quarter of 2005. Following this letter, the union did not request to bargain the effects of the employer's decision.

5. The reconfiguration did not proceed as scheduled. On April 3, 2006, the employer informed employees by a memo that the move would begin on April 10, 2006. The employer moved the work stations closer together. Four work stations were added to the communications center floor.

6. A copy of the April 3, 2006 memo was not sent to the union.

7. On May 1, 2006, the union requested to bargain both the reconfiguration decision and the effects of the decision.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. As described in Finding of Fact 4 and 5, the layout and reconfiguration of employee work stations in the communica-

tions center is a permissive subject of bargaining under RCW 41.56.030(4).

3. As described in Finding of Fact 4, the City of Seattle provided notice to the Seattle Police Dispatchers Guild of the employer's reconfiguration decision.

4. As described in Finding of Fact 4, the Seattle Police Dispatchers Guild waived through inaction its right to bargain any effects of the employer's reconfiguration decision.

5. By its reconfiguration decision, as described in Finding of Fact 4 and 5, the City of Seattle did not refuse to bargain or violate RCW 41.56.140(4) or (1).

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED.

ISSUED at Olympia, Washington, this 1st day of February, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

PAUL T. SCHWENDIMAN, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.